

**DECISION DOCUMENT FOR THE MODIFIED COURT ORDERED § 303(d) LIST
FOR LOUISIANA
February 29, 2000**

I. Litigation Background

In 1996, two Louisiana environmental groups, the Sierra Club and the Louisiana Environmental Action Network (Plaintiffs), filed suit in Federal court against the U.S. Environmental Protection Agency (EPA) for violations of the Administrative Procedure Act (APA) and §303(d) of the Clean Water Act (CWA). The Plaintiffs alleged that EPA improperly approved Louisiana's 1992 and 1994 §303(d) lists, and failed to identify and list all Louisiana waters that exceed water quality standards. The Plaintiffs also alleged that EPA failed to reasonably schedule and establish total maximum daily loads (TMDLs) for all Louisiana waters not meeting water quality standards.

In June 1998, the assigned Special Master recommended that Plaintiffs partially prevail in summary proceedings. Specifically, the Special Master recommended that the Court order EPA to file an administrative record for the most recent Louisiana §303(d) list approved by EPA, and a reasonable schedule for establishing TMDLs. By a September 22, 1998, order (amended by a December 3, 1998, order), the Court ordered EPA to provide the Special Master with its administrative record for the most recently approved Louisiana §303(d) list. Additionally, the Court ordered EPA to file a reasonable TMDL schedule.

Consistent with the Court's September 1998 order, EPA provided the Special Master with the certified administrative record for EPA's approval of Louisiana's 1998 §303(d) list on October 22, 1998. The certified administrative record documented EPA's review and consideration prior to rendering a decision on Louisiana's 1998 §303(d) list. EPA also served a TMDL schedule to the Special Master as directed by the Court on December 18, 1998.

On October 1, 1999, the Court issued a judgment in this action (Sierra Club, et al. v. Clifford et al., No. 96-0527, [E.D. La. Oct. 1, 1999]). The judgment incorporates the Court's Orders (Dec. 3, 1998, and Oct. 1, 1999) ruling that EPA had a mandatory duty under §303(d) to establish TMDLs, and the Agency's approval of Louisiana's 1998 §303(d) list arbitrary and was capricious under the APA. The Court ordered EPA to disapprove the State list, establish a new §303(d) list within 30 days, and establish TMDLs for these listed waters. The TMDLs are to be established in accordance with the priority assigned by the court. On November 29, 1999, EPA filed a notice of appeal.

II. Requirements of the Court Ordered §303(d) list

With respect to Count III of the complaint, the Court directed EPA:

a) To disapprove the 1998 identification submitted by Louisiana; and

b) To file with the Court, within 30 days, a new identification consistent with this order.

i) If defendants decide to delete any waters that were included in Louisiana's 1996 identification, the identification must offer a reasoned explanation for the deletion. In addition, the decision must explain whether the agency is relying on Louisiana's Section 305(b) report, the state's 1998 unified watershed assessment, and the state's metals data. If the defendants choose not to rely on any of these documents, the identification must include a reasoned explanation for that choice. If the defendants rely on any of these documents, the agency shall include them in the administrative record.

ii) In preparing the identification, the defendants shall, at a minimum, evaluate "all existing and readily available" data and information on the following waters:

A) Those identified as not meeting water quality standards in Louisiana's 1996 identification under Section 303(d).

B) Those included on Louisiana's Section 319 list of waters that do not meet water quality standards because of nonpoint source pollution.

C) Those contained in Louisiana's Section 304(l) list of waters that do not meet water quality standards because of toxic pollution.

D) Those interstate waters in Louisiana that other states have previously identified as failing to meet water quality standards.

iii) In preparing the identification, the defendants shall include all waterbodies on Louisiana's Section 319 and Section 304(l) lists, unless it is demonstrated on the record that (1) a waterbody on the Section 319 or 304(l) list is meeting all applicable water quality standards, including numeric and narrative criteria and designated uses; or (2) if, upon re-examination, the original basis for listing is determined to be inaccurate.

III. EPA Action

On October 28, 1999, EPA Region 6 disapproved Louisiana's 1998 §303(d) list and submitted a list of water quality limited segments in its place, the Court Ordered §303(d) list.

Consistent with this Decision Document, EPA has changed the Court Ordered §303(d) list, by compiling a Modified Court Ordered §303(d) list. This Modified Court Ordered §303(d) list was compiled by utilizing the following information:

A. The Louisiana 1996 §303(d) list

Pursuant to part (b)(i) of the Court's Order, to evaluate "all existing and readily available" data and information on those waters included on the State's 1996 §303(d) list, EPA evaluated the data and information that was available to it. This information is included in the Administrative Record. Pursuant to part (b)(ii)(A) of the Court's Order, EPA included each 1996 §303(d) listed water on the Court Ordered §303(d) list, except where a reasoned explanation was provided. The State's 1998 §303(d) list included 195 waterbodies; the Court Ordered §303(d) list included 349 waterbodies. Appendix A to the Modified Court Ordered §303(d) list Decision Document describes in detail why certain waterbody/pollutant combinations from the State's 1996 §303(d) list are not included on the Modified Court Ordered §303(d) list. These waterbody/pollutant combinations on the 1996 §303(d) list were not included on the Modified Court Ordered §303(d) list for one of the following reasons:

- 1) Some causes of impairment on the State's 1996 §303(d) are not "pollutants" requiring TMDLs. For example, "flow alteration" or "habitat alteration" are not pollutants for which TMDLs are required, and are thus not required to be listed under EPA's regulations. See Appendices A and E for specific waterbody/pollution combinations not included on the Modified Court Ordered list.
- 2) Louisiana's 1998 §305(b) assessment demonstrated that the waterbody meets water quality standards for a pollutant identified on the State's 1996 §303(d) list. See Appendices A and E for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 3) Louisiana conducted new assessments using the 305(b) assessment methodology for monitoring data between January 1995 and July 1999 that demonstrate that the waterbody meets water quality standards for a pollutant identified on the State's 1996 §303(d) list. See Appendices A and E for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 4) Louisiana interprets its dissolved oxygen standards to directly correlate with overall nutrient impacts. "Thus when the LDEQ maintains and protects DO, the LDEQ is in effect also limiting and controlling nutrient concentrations and impacts." Therefore, where the DO standard is met, the nutrient standard is also met. See Appendices A and E for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.

B. The 1998 final §305(b) report, unified watershed assessment and metals data

Pursuant to part (b)(i) of the Court's Order, described above, EPA relied on Louisiana's final 1998 §305(b) report in compiling the Modified Court Ordered §303(d) list. Because this document existed only in draft form at the time the State submitted its 1998 §303(d) list, EPA could not consider the final §305(b) report when the Agency approved the State's list. This final 1998 §305(b) report included a summary of the State's metals data (additional metals data collected after the compilation of the 1998 §305(b) data was submitted by LDEQ during the comment period on the Court Ordered list). Thus, EPA considered the State's metals data during the compilation of the Modified Court Ordered §303(d) list. See Appendices A, B, C, and E for information concerning specific waterbody/pollutant combinations.

EPA also relied on Louisiana's 1998 unified watershed assessment in compiling the Modified Court Ordered §303(d) list. Louisiana assesses water quality in 476 subsegments of the 59 USGS eight-digit hydrologic unit (HUC) watersheds. For the unified watershed assessment, the HUC's were assigned to a category based upon the predominate water quality condition of the subsegments within the HUC. As a result, identification of a HUC watershed as having poor water quality does not necessarily correlate to identification of every subsegment within that HUC watershed as impaired for purposes of the §303(d) list. In preparing the Modified Court Ordered §303(d) list the unified watershed assessment was used to determine, to the extent appropriate, consistency with the 1998 §305(b), §319 assessment, §304(l) list, and 1996 §303(d) list.

Consistent with the Court's Order, EPA used these reports and data to determine whether water quality standards (designated uses, numeric criteria, narrative criteria) were being met for individual subsegments. If EPA determined, based on these reports and data, that a waterbody was not meeting water quality standards, EPA included the waterbody on the Modified Court Ordered §303(d) list. If EPA determined, based on these reports and data, that a waterbody was meeting water quality standards, EPA did not include the waterbody/pollutant combination on the Modified Court Ordered §303(d) list (See Appendices A-C, E).

EPA also relied on the October 28, 1999, Court Ordered § 303(d) list, administrative record (documents 1-30), and data and information found in Appendix E to compile the Modified Court Ordered §303(d) list.

C. The §319 list

Pursuant to parts (b)(ii)(B) and (b)(iii) of the Court's Order to evaluate "all existing and readily available" data and information on those waters included on Louisiana's §319 "Nonpoint Source Assessment Report," EPA evaluated all data and information available to the Agency on these waters. This information is included in the Administrative Record. All waterbodies on Louisiana's §319 assessment report that had a degree of support of threatened, partial or not, were considered for the

Modified Court Ordered §303(d) list. These degrees of support are associated with expected failure or failure to meet water quality standards (designated uses, numeric criteria, narrative criteria) not being met. All waterbodies on Louisiana's §319 assessment report that had a "full" degree of support were not included on the Modified Court Ordered §303(d) list because these were waters that Louisiana included on its §319 list as waters that the State considered to be meeting water quality standards. Appendix B describes in detail why certain waterbody/pollutant combinations from Louisiana's §319 assessment report list are not included on the Modified Court Ordered §303(d) list. These waterbody/pollutant combinations on Louisiana's §319 assessment report not included on the Modified Court Ordered §303(d) list for one of the following reasons:

- 1) Some causes of impairment on Louisiana's §319 assessment report are not "pollutants" requiring TMDLs. For example, "flow alteration" or "habitat alteration" are not pollutants for which TMDLs are required, and are thus not required to be listed under EPA's regulations. See Appendix B for specific waterbody/pollution combinations not included on the Modified Court Ordered list.
- 2) Louisiana's 1998 §305(b) assessment demonstrates that the waterbody satisfies water quality standards for a pollutant identified on Louisiana's §319 assessment report. See Appendix B for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 3) Louisiana interprets its dissolved oxygen standards to directly correlate with overall nutrient impacts. "Thus when the LDEQ maintains and protects DO, the LDEQ is in effect also limiting and controlling nutrient concentrations and impacts." Therefore, where the DO standard is met, the nutrient standard is also met. See Appendix B for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 4) Louisiana conducted new assessments using the 305(b) assessment methodology for evaluative assessments that demonstrate that the waterbody satisfies water quality standards for a pollutant identified on Louisiana's §319 assessment report. See Appendix B for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.

The §319 assessment report was utilized to document whether water quality standards (designated uses, numeric criteria, narrative criteria) were being met for individual subsegments. Waters in the §319 report were included on the Court Ordered §303(d) list unless it was determined by reports, data or other information that a waterbody was meeting water quality standards. See Appendices A-C.

EPA also relied on the administrative record for the October 28, 1999, Court Ordered §

303(d) list, and data and information found in Appendices E to compile the Modified Court Ordered §303(d) list.

D. The §304(l) list

Pursuant to parts (b)(ii)(C) and (b)(iii) of the Court's Order to evaluate "all existing and readily available" data and information on those waters included on Louisiana's §304(l) list of waters, EPA evaluated all data and information available to the Agency on these waters. Appendices C and E describes in detail why certain waterbody/pollutant combinations from Louisiana's §304(l) list are not included on the Modified Court Ordered §303(d) list. These waterbody/pollutant combinations on Louisiana's §304(l) list that were not included on the Modified Court Ordered §303(d) list for one of the following reasons:

- 1) Some causes of impairment on Louisiana's §304(l) list are not "pollutants" requiring TMDLs. For example, "flow alteration" or "habitat alteration" are not pollutants for which TMDLs are required. See Appendix C for specific waterbody/pollution combinations not included on the Modified Court Ordered list.
- 2) Louisiana's 1998 §305(b) assessment demonstrates that the waterbody satisfies water quality standards for a pollutant identified on Louisiana's §304(l) list. See Appendix C for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 3) Louisiana conducted new assessments using the 305(b) assessment methodology for monitoring data between January 1995 and July 1999 that demonstrate the waterbody satisfies water quality standards for a pollutant identified on Louisiana's §304(l) list. See Appendix C for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 4) Louisiana interprets its dissolved oxygen standards to directly correlate with overall nutrient impacts. "Thus when the LDEQ maintains and protects DO, the LDEQ is in effect also limiting and controlling nutrient concentrations and impacts." Therefore, when the DO standard is met, the nutrient standard is also met. See Appendix C for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 5) New data submitted during the public comment period show that water quality standards for the certain waterbodies are met. See Appendix E for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.

The §304(l) list was utilized to document whether individual subsegments met water quality

standards (designated uses, numeric criteria, narrative criteria). Waters on the §304(l) list were included on the Modified Court Ordered §303(d) list unless EPA determined that the waterbody was meeting water quality standards. See Appendices A-C and E.

EPA also relied on the October 28, 1999, Court Ordered §303(d) list, administrative record (documents 1-30), and data and information found in Appendix E to compile the Modified Court Ordered §303(d) list.

E. Interstate waters and adjoining states (Texas, Arkansas, Mississippi) §303(d) lists

Pursuant to part (b)(ii)(D) of the Court's Order, described above, EPA evaluated "all existing and readily available" data and information on those interstate waters in Louisiana that other adjoining states previously identified as failing to meet water quality standards. Appendices D and E describes in detail why certain waterbody/pollutant combinations from interstate waters and adjoining states (Texas, Arkansas, Mississippi) §303(d) lists are not included on the Modified Court Ordered §303(d) list. These waterbody/pollutant combinations on interstate waters and adjoining states' (Texas, Arkansas, Mississippi) §303(d) lists were not included on the Modified Court Ordered §303(d) list for one of the following reasons:

- 1) Louisiana's 1998 §305(b) assessment demonstrates that the waterbody meets Louisiana water quality standards for a pollutant identified on interstate waters concerning adjoining states (Texas, Arkansas, Mississippi) §303(d) lists. See Appendix D for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 2) Louisiana conducted new assessments using the §305(b) assessment methodology for monitoring data between January 1995 and July 1999. The above assessments demonstrates that the waterbody meets Louisiana water quality standards for a pollutant identified on interstate waters concerning adjoining states (Texas, Arkansas, Mississippi) §303(d) lists. See Appendix D for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.
- 3) Data or information gathered in Louisiana do not support listing a pollutant in a given subsegment.
- 4) Louisiana's §319 Assessment Report lists the given subsegment as full degree of support.
- 5) Assessment of the adjoining State's data using Louisiana's Water Quality Standards show that it would meet water quality standards in Louisiana. See Appendix E for specific waterbody/pollutant combination data.

IV. *The Modified Court Ordered §303(d) list*

EPA considered all information cited herein during development of the Modified Court Ordered §303(d) list. The Modified Court Ordered §303(d) list includes 348 waterbodies, and 1,672 pollutants of concern (waterbody/pollutant combinations). The Court Ordered TMDL schedule requires TMDL development according to a river basin approach. TMDL completion is set according to the following schedule:

1. Mermentau/Vermilion/Teche basins (12/31/99);
2. Calcasieu/Ouachita basins (12/31/2001);
3. Barataria/Terrebonne basins (12/31/2003);
4. Red/Sabine basins (12/31/2005);
5. Ponchartrain basin (12/31/2006); and
6. Mississippi/Atchafalaya/Pearl basins (12/31/2007).

The Modified Court Ordered §303(d) list presents challenges to the State and EPA with respect to developing TMDLs according to the Court Ordered TMDL schedule. These challenges are based upon the lack of information on these water bodies, the time needed to gather and analyze such information, calibration of water quality models, public participation, technical review by EPA, and the sheer number of TMDLs.

In addition, new ambient monitoring data submitted by LDEQ during the public comment period demonstrates that some waterbody/pollutant combinations found in Louisiana's 1998 §303(d) list, for the Mermentau/Vermilion/Tech basins do not need TMDLs. See Appendix E.

V. Public Participation / List Revision

EPA's regulations provide for public participation where the Agency disapproves a State §303(d) list and establishes a list itself. Pursuant to 40 C.F.R. §130.7(d)(2), from November 29, 1999, through December 29, 1999, EPA publicly noticed and sought comment on the October 29, 1999, Court Ordered §303(d) list. EPA received comments (See Appendix E), and data and information supporting removal of waterbody/pollutant combinations from the October 29, 1999, Court Ordered §303(d) list. These waterbody/pollutant combinations were not included on the Modified Court Ordered §303(d) list for one of the following reasons:

- 1) New data (metals) submitted during the public comment period shows that water quality standards are being met for certain waterbodies. See Appendix E for specific waterbody/pollutant combinations (including rationale) not included on the Modified Court Ordered list.

- 2) Assessment of existing data and information (phosphorus, turbidity, suspended solids and siltation) shows that water quality standards are being met for certain waterbodies. See Appendix E for specific waterbody/pollutant combinations (including rationale) not included on the Modified Court Ordered list.
- 3) The original basis for listing was determined to be inaccurate. See Appendix E for specific waterbody/pollutant combinations not included on the Modified Court Ordered list.

In addition, EPA received comments and information warranting the addition of waterbody/pollutant combinations to the October 29, 1999, Court Ordered §303(d) list. Upon re-examination, waterbody/pollutant combinations for Bayou Blue (subsegment 120706), Caddo Lake and James Bayou (subsegment 100307), Paw Paw Bayou (subsegment 100308), and Morgan Harbor/Lake Ponchartrain Basin (subsegment 042205) were added to the Modified Court Ordered §303(d) list. They were added to the list due to the Court's listing standard for including waters on a §303(d) list. As a result of the revisions, EPA compiled the Modified Court Ordered §303(d) list on February 29, 2000. EPA will promptly transmit the Modified Court Ordered §303(d) list to Louisiana Department of Environmental Quality.

The State may make subsequent revisions to the §303(d) list by submitting new lists to the Agency in accordance with 40 C.F.R. §130.7. EPA will take appropriate action to approve or disapprove list submissions from the State at that time.

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